

STATE OF MICHIGAN  
IN THE SUPREME COURT

DAVID M. MICK

Plaintiff/Appellee,

Supreme Court No. 126547  
Court of Appeals Case No.241121  
Oakland County Circ. No. 00-027577-NZ

LAKE ORION COMMUNITY SCHOOLS,  
ROBERT BASS, RICHARD KAST, CRAIG A.  
YOUNKMAN, GLORIA ROSSI,  
Defendants/ Appellants.

-and-

DAVID M. MICK

Supreme Court No. 126548  
Court of Appeals Case No.241122  
Oakland County Circ. No. 01-033085-NZ

Plaintiff/Appellee,

v

ROBERT BASS, an individual, and  
RICHARD KAST, an individual,

Defendants/Appellants.

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**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN**  
**OPPOSITION TO DEFENDANT-APPELLANTS' APPLICATION**  
**FOR PEREMPTORY REVERSAL OR LEAVE TO APPEAL**

126547-8

**FILED**

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**STATEMENT OF QUESTIONS PRESENTED**

- I. **WHETHER DEFENDANT'S ARGUMENTS ESTABLISH A PROPER GROUND FOR REVIEW BY THIS COURT AS TO PLAINTIFF'S GENDER CLAIM AS TO THE ORION OAKS POSITION, WHERE PLAINTIFF SUBMITTED ABUNDANT AND UNDISPUTED PRIMA FACIE AND PRETEXT EVIDENCE?**

PLAINTIFF/APPELLEE ANSWERS "NO"

DEFENDANT/APPELLANT ANSWERS "YES"

THE COURT OF APPEALS ANSWERED "NO"

- II. **WHETHER DEFENDANT'S ARGUMENTS ESTABLISH A PROPER GROUND FOR REVIEW BY THIS COURT AS TO PLAINTIFF'S RETALIATION CLAIM, WHERE THE COURT OF APPEALS WAS CORRECT IN FINDING A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO PLAINTIFF'S CLAIM OF RETALIATION FOR FILING AND SUCCEEDING IN AN EEOC CLAIM, WHERE PLAINTIFF'S LONG, UNBLEMISHED CAREER AND REPUTATION CAME UNDER SEVERE ATTACK WITHIN DAYS OF HIS BEING SUCCESSFUL IN THE EEOC?**

PLAINTIFF/APPELLEE ANSWERS "YES"

DEFENDANT/APPELLANT ANSWERS "NO"

THE COURT OF APPEALS ANSWERED "YES"

## **I Statement of Facts**

### **A. Introduction and Proceedings Below**

Plaintiff-Appellee David Mick ("Plaintiff" or "Mick"), a male, has been employed as an elementary school teacher with Defendant-Appellant Lake Orion Community Schools ("Defendant" or "District" or "LOCS") since 1974. Between 1991 and 1998, Mick applied for administrative positions 6 times and was rejected each time. On each occasion, the job was given to a female candidate. On each occasion, Mick was qualified for the position. In July, 1998, Mick filed a charge of gender discrimination against the District with the federal Equal Employment Opportunity Commission ("EEOC"). After his filing of the charge, the District rejected Mick from further administrative positions, removed him from paid committee positions he held exclusively and successfully for multiple years, criticized and disciplined him for the first time in his career, and treated Mick differently in favor of others who were either female or had not gone to the EEOC for violations of their civil rights.

Plaintiff brought suit in Oakland County Circuit Court alleging gender discrimination and retaliation in violation of the Elliott-Larsen Civil Rights Act, 37.2201 et seq., on November 20, 2000 against the District and four individual administrators. Plaintiff later filed a second suit against individuals Robert Bass and Richard Kast, two former District administrators, on July 6, 2001, and the two cases were consolidated for purposes of discovery and pretrial proceedings. On March 25, 2002, Hon. Gene Schnelz granted the combined Defendants' motion for summary disposition under MCR 2.116 (C)(7) and (10). On April 11, 2002, Judge Schnelz denied Plaintiff's motion for reconsideration.

On June 3, 2004, the Court of Appeals affirmed in part and reversed in part;

unpublished per curiam opinion of the Court of Appeals, June 3, 2004, Docket Nos. 241121, 241122.

Defendant/Appellant is now asking this Court to peremptorily reverse, or consider after granting leave to appeal, the Court of Appeals decision. Plaintiff/Appellee opposes this request, as there is no reason this Court's jurisdiction need be invoked in this matter. There is no unsettled or undeveloped law of discrimination that should, under the circumstances of this case, be addressed by this Court; nor was there here any clear error by the Court of Appeals majority in its ruling. Plaintiff requests and urges the Court to deny Defendant's Application in its entirety for the reasons set forth below.

**B. Statement of Facts<sup>1</sup>: The requirements for the position of elementary principal in LOCS**

LOCS posted the following general requirements or desired criteria relevant to applications for elementary school principal positions during the last 10 years:

- Valid elementary Michigan teaching certificate
- Master's degree from an accredited institution
- Three years successful teaching experience
- Knowledge and experience with school improvement and school accreditation processes;
- Strong sense of mission for serving students and community; excellent communication skills (written and oral); a vision for the future of students and the educational process; knowledge of current educational research and practices; flexibility and adaptability to change; excellent interpersonal skills; working knowledge of computers; sensitivity to the diversity of

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<sup>1</sup> This statement of facts includes events which the Court of Appeals has ruled untimely for purposes of liability. However, the facts of these events remain useful and admissible in the suit as "background information illuminating later practices and, thus, revealing discriminatory motives." *Brunson v E & L Transport*, 177 Mich App 95 (1989), citing, *inter alia*, *United Airlines, Inc v Evans*, 431 US 553, 558, 97 S Ct 1885, 52 L Ed 2d 571 (1977).

students, staff and community. (See Exh. 1, generally.)

C. Plaintiff's qualifications for the job of elementary principal

At the time of each of his applications for an elementary principal or administrative position beginning in 1991, Plaintiff met and exceeded the requirements for the job. He began teaching in Lake Orion in 1974. Exh. 3. He served as elementary and middle school teacher for 27 years, the last 13 to the present as a 5th grade teacher at Webber Elementary School ("Webber"). Id. Plaintiff received two Masters' degrees in education, one in Curriculum, Instruction and Leadership in 1990 and another in Guidance and Counseling in 1983, both from Oakland University. Id. Between 1990 and the present, Mick has been certified as an elementary and middle school administrator<sup>2</sup>, as a K-12 (kindergarten through 12<sup>th</sup> grade) counselor, and as a K-9 teacher. Exh. 4. He served for 10 years as chairman of the building School Improvement/Accreditation Steering Committee for strategic planning that successfully achieved and maintained for Webber the highest level of accreditation status from North Central Association of Colleges and Schools. Exh. 5.<sup>3</sup>

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<sup>2</sup> "Administrator" includes the position of principal. The State no longer requires such certification.

<sup>3</sup> Further as to Plaintiff's performance as School Improvement Chairman, in a point relevant also to Plaintiff's evidence of pretext, early in Plaintiff's tenure, superintendent Defendant Bass wrote to Plaintiff:

On behalf of the Board of Education and myself, I would like to thank you for your participation in the recent presentation of Webber Elementary School's School Improvement Plan. It is indeed a pleasure to observe **your obvious enthusiasm and dedication** to the Lake Orion School District and the students we serve. .... We are proud of



Plaintiff also chaired the district-level K-12 Social Studies Committee for approximately 10 years with great success. Exh. 5<sup>4</sup>. Assistant superintendent Leroy Mabery, predecessor to Defendant Beiter, wrote of Plaintiff in **1992**,

Dave ... has become involved and is a leader with core curriculum and outcome based education. ... I have the highest regard for Dave Mick's professional commitment. Dave is very interested in becoming an elementary principal. *I believe he is ready and recommend him without reservations.* (Exh. 6a) (Emphasis added.)

Dr. Mabery later wrote to Plaintiff in **1995**, "I want to personally thank you for the excellent leadership you have demonstrated as chairperson of K-12 social studies." Exh. 6b. In **1997** Mabery told all building principals in the district, "Dave Mick, as district K-12 social studies chairperson, along with the committee have done an excellent job of aligning our curriculum." Exh. 6c. Co-chairpersons, former chairpersons, and colleague teachers involved with social studies curriculum committees also wrote outstanding evaluation and praise letters regarding Plaintiff and his performance in the social studies arena. See Exh. 7, a collection of such writings from District employees Tom Romito, co-chairperson, district social studies; Sam Bearden, former chairperson; Chris Bell, social studies teacher

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the accomplishments of our school district and the professionalism on the part of our staff members. ... Exh. 19. Emphasis added.

Bass would later testify, contrary to this letter, in an attempt to smear Plaintiff's qualifications and justify the rejection of Plaintiff from administrative positions, that Plaintiff was "stiff," Exh. 2, p.89, and that he *never* saw Plaintiff act with enthusiasm. Id., pp. 82-83.

<sup>4</sup> Being a chairperson on school improvement and social studies committees at building and/or district levels is acknowledged in the District as a form of "administrative experience;" see, resume of Tepper, Exh. 16; dep. of Tepper, Exh. 21, pp. 13-14; Exh. 22, District listing Tepper's experience; Exh. 36 ["leadership role"].

and committee member; Melissa Berndt, science chairperson and Webber colleague; Diana Dodson, Lake Orion teacher and leader; and Connie Lewandowski, former Lake Orion Junior High social studies department chair.

In **1993** Plaintiff was selected for the Newsweek-WDIV Outstanding Teacher Award (Exh. 10a); in **1999** was selected for inclusion in *Who's Who Among American Teachers* (Exh. 10b); and in **2001** nominated as "Most Inspiring Staff Member" (Exh. 10c) and for a Disney American Teacher Award (Exh. 10d). Plaintiff also received a large number of outstanding letters of recommendation year after year from superintendents, assistant superintendents, college deans and other school and public officials, peers and parents. Even Defendant assistant superintendent Kast wrote of Plaintiff in **1993**:

David Mick has asked that I write a letter of recommendation concerning his professional performance with the Lake Orion Community School District. It is with extreme pleasure that I do so.

*I cannot sing enough praises of David Mick. He is an outstanding teacher who gives of himself to an unbelievable degree. Adjectives I would use to describe him include, dedicated, innovative, caring, and hard working. I could go on, but the above capture the essence of David. He has exhibited leadership skills by heading up many professional development committees, both building and district. His leadership in setting the highest standards for our students has been exemplary.*

Exh. 8. (Emphasis added.) Kast confirmed these comments in deposition. Exh. 14, p.53.

Defendant superintendent Bass echoed Kast's praise in **1993**; please see Exh. 9. Exh. 10

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is a sampling of other letters of recommendation from people in the community over the years; see, especially the descriptions of Mr. Mick's character and personality, which Defendants put into issue in this case as justification for rejecting Plaintiff as a principal.

It is undisputed on the record below that Plaintiff has the credentials and is qualified to be an elementary principal in Lake Orion Schools. As stated by current superintendent Defendant Dr. Craig Younkman:

Q You would agree, Dr. Younkman, that Mr. Mick is certainly qualified to be a principal [in] the Lake Orion school district?

A He holds qualifications and training, yes. (Dep. of Younkman, Exh. 11, pp.96-97.)

*Same*, see dep. of former assistant superintendent Defendant Kast, Exh. 14, p. 57; dep of Defendant Rossi, Exh. 12, p. 159; dep. of Defendant Lehman, Exh. 13, pp. 100-101.

**D. Plaintiff applied for 6 elementary administrative positions in Lake Orion before his EEOC claim**

It is not disputed that Plaintiff **applied** for the positions at issue in this suit. Defendants did not raise this issue in the trial court. Table 1 indicates the jobs Plaintiff applied for, the year of the applications and the ultimate recipient of the job, with gender; all of these applications were made **before** Plaintiff filed with the EEOC on July 1, 1998.

**TABLE 1.**

Elementary school principal/admin job applied for by Mick	Year	Recipient of job	Gender of recipient of job
Blanch Sims (prin.)	1991	Janet Burns	female
Pine Tree (prin.)	1995	Beverly Tepper	female
Webber (prin.)	1996	Gloria Rossi	female
Blanche Sims (prin.)	1996	Diane Benjamin	female
Orion Oaks (admin. assistant)	1997	Melanie Olds	female

Orion Oaks (prin.)	1998	Melanie Olds	female
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**E. The posting and application process**

The Master Agreement<sup>5</sup> ("contract") between the Lake Orion Education Association (teachers' union) and LOCS addresses the situation of teachers applying for administrative positions in Lake Orion. It contains in part the following provisions at pages 16 and 17, with emphasis added:

**ARTICLE XI – VACANCIES, PROMOTIONS AND TRANSFERS**

- A. [Requests by teachers for transfers to different building or position]
- B. The Board ***shall***, during the school year, notify the teaching staff of teaching, adult/community education and ***supervisory vacancies***<sup>6</sup>. The vacancies ***shall be posted in each building*** for five (5) school days during the school year. ....

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The Board agrees to give ***preferential consideration to members of its own teaching staff in filling all vacancies, according to seniority, certification, accreditation standards and qualifications. Qualifications shall mean major, minor or graduate degree as posted.***

- C. [Vacancies filled by transfers...]
- D. All ***in-system applicants*** for a position ***shall be notified*** promptly by a designated representative of the Board that an appointment to a vacancy has been ..

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<sup>5</sup> There is no dispute that the referenced contract, Exh. 17, is the current one in effect from August 31, 1998 to the present, and that there have been no material changes in the contract from previous editions addressing issues in this suit.

<sup>6</sup> It is undisputed that "supervisory," as it relates to teachers, means principals and sometimes assistant principals. See, eg., dep. of former Assistant Superintendent Defendant Kast, Exh. 14, pp. 93-95.

made. The notification shall take place before the release to the general public. (Exh. 17.)

As to the application process itself, principals are said by the District to be chosen by committee with final approval by the Board of Education. Exh. 13, pp. 26-27, 80. Committees are formed from teachers, parents, administrators and sometimes students. Id., pp. 68-70. Committees are given information packets submitted by applicants and make an initial determination which of the applicants will receive an interview. Id., p. 92. At the initial interview, committee members ask questions they have prepared in advance. Id., p. 70. Whoever the committee votes as the final choice is then approved by the assistant superintendent and presented to the superintendent. Id., pp. 72-73. The superintendent then presents the candidate to the Board for approval. Id., pp. 80-81. Defendant Lehman, with the District for 20 years, Exh. 13, p. 5, testified that she has never known a recommendation of the superintendent as to a principal hiring to be rejected by the school board. Exh. 13, pp. 81-82.

**F. Defendant's practice of decisionmaking in the hiring of principals**

Despite the preliminary process of the committee-based system, the District's practice is that the ultimate determination of who succeeds to a principal position is made by the superintendent in consultation with the assistant superintendent. Id., p. 72.

The district also asserts that there is nothing in writing anywhere that expresses any limitation of any kind on the power of the administration to have who it wishes occupy the positions of principal in its elementary schools:

Q So are you saying that in your opinion the Master Agreement has nothing to do with the ability of a

superintendent to appoint a teacher to an administrative position?

A Right.

Q Does the time of year that the vacancy occurs matter to what you're now testifying? In other words, can the superintendent appoint a teacher to an administrative position at any time of year if appropriate?

A **A superintendent can do whatever he wants, yes.**

Dep. of Ass't Super. Defendant Lehman, Exh. 13, p. 48. (Emphasis added.)

**G. Discriminatory treatment of Plaintiff in application processes, and Plaintiff's claim with the EEOC**

The 1991 Blanche Sims principal vacancy was the first for which Plaintiff applied. Defendant Robert Bass had just arrived as the new superintendent in the District, and the Blanche Sims opening was Bass' first opportunity to oversee a principal hiring in his new District. Although David Beiter (who later became an assistant superintendent and in that capacity has been named a defendant here) was interviewed and hired for the job, Defendant Bass transferred Beiter out of the elementary school and into the principalship of the Lake Orion high school. Exh. 13, p. 24. Bass then "appointed" Janet Burns to the principalship of Blanche Sims without a competitive application process; Exh. 2, pp. 46-47.

In 1995, for the Pine Tree Elementary principal vacancy, the district gave Beverly Tepper the job with the credentials listed in Table 2 below, compared to Plaintiff's credentials at the time. Table 2 shows that Plaintiff had more leadership credentials than Tepper, had inside recommendation letters that Tepper did not have, and was an in-district applicant with contractual "preference" status versus Tepper, who was an out-of-district applicant:

**TABLE 2.**

Tepper	Mick
-Teacher, 22 years	-Teacher, 21 years
-Master's degree	-Two Master's degrees
-Chairperson NCA/School Improvement Committee, 5 yrs.	-Chairperson NCA/School Improvement Committee, 5 yrs.
-Misc. chair and committee positions	-Misc. chair and committee positions
-[N/A]	-Chairperson District Social Studies Curriculum Committee, 5 yrs.
-[N/A]	-Recommendation letters from Lake Orion superintendent, assistant superintendent (Exhs. 9 and 8.)
-[N/A] (out-of-district applicant)	-in-district applicant with contract provision requiring "preferential consideration" be given to in-district applicants (Exh. 17)

See Tepper resume, Exh. 16, and Plaintiff resume, Exh. 3.

In 1996, Plaintiff applied for principal openings at Blanche Sims Elementary and at his own school, Webber. Defendant Kast told Plaintiff he would be a full candidate at both schools. Exh. 27, pp. 64-65. At Blanche Sims, the day after Plaintiff's interview, a member of the committee told Plaintiff that the committee had not chosen any candidates. Exh. 27, pp. 66-67. However, Kast called Plaintiff that day and told him that two candidates, one for each of Webber and Blanche Sims, *had* been chosen and presented to the Board for approval. *Id.*, pp. 64-67. Diane Benjamin was given the Blanche Sims job.

For the Webber opening, contrary to Kast's statement to Plaintiff that he would be a "full candidate," the interviewing committee was not given Plaintiff's materials; Plaintiff was not considered as a candidate at Webber. Exh. 25, p. 20. Gloria Rossi was given the job by the district, despite the fact that two committee members had discovered negative

things about Ms. Rossi's prior performance and had meant to disqualify Ms. Rossi because of it; see *infra* at pp. 13-14. Margo Pittman, a Media Specialist employed in the district for 30 years, Exh. 24, p.5, was on the interviewing committee for the Webber principal vacancy that year. She interviewed Rossi, among others, and sought afterwards, with another member of the committee named Jan Glebe, to find out more about Rossi by making a "site visit" to Rossi's previous place of employment as a principal. *Id.*, p. 15. Pittman testified to what she found out about Rossi there, before Rossi was hired in Lake Orion:

Q And you gathered some negative information about Ms. Rossi on that site visitation, correct?

A Yeah, absolutely. \*\*\* [someone told us] "Well, sometimes she makes decisions that she shouldn't and sometimes she doesn't make decisions that she should," and it was like, okay, we all do that. But we just came out with not a good feeling, let's put it that way.

Exh. 24, p. 16. Glebe confirmed that she and Pittman had gathered "negative" information about Rossi during the site visitation, Exh. 25, p. 24, and further stated that some of the failings in Ms. Rossi's qualifications that Glebe and Pittman had learned on the site visitation had been confirmed in Rossi's subsequent performance as Webber's principal. *Id.*, p. 27.

However, after Pittman reported their findings to Defendant Kast, assistant superintendent at the time, he told Pittman, "It's too late, Bob [Bass] liked her and she's hired." Dep. of Pittman, Exh. 24, p. 17. Pittman went on to testify:

Q Is it fair to say that in that instance, Mr. Bass took the decision out of the hands of the committee and finished



it unilaterally by himself; is that fair to say?

A That's how I felt. I mean—

Q That's what Mr. Kast told you?

A Basically, yeah. (Exh. 24, p. 18)

Throughout the years, Plaintiff was repeatedly encouraged by the Lake Orion administration to continue applying for principalships, and was repeatedly told that there was nothing he could do to improve or enhance his credentials or candidacies in any way. Exh. 27, pp. 46-48.<sup>7</sup>

In 1997, Plaintiff applied for the Orion Oaks Administrative Assistant job, Exh. 23, even though the pay would have been less than his teacher's salary. Plaintiff determined that this job could establish him in a position that would be a stepping-stone to a principalship. Plaintiff's application, however, was ignored by the administration; Melanie Olds was "appointed" to the position by superintendent Bass after what Bass called "limited competition". Dep. of Bass, Exh. 2, pp. 50-51. Olds had less education than Plaintiff, less experience in the field of education, and less (because zero) administrative experience than Plaintiff, whose long service as chairman of the school improvement and social studies committees qualified as administrative experience; see footnote 3, *supra*, and Table 3 below. In addition, Plaintiff had the qualification, which Olds did not have, of having done professional research in the area of multi-aged instructional grouping for several years as a Research Associate at Oakland University. Exh. 27, pp. 16-18, plus Exh. 30 of Mick dep. at b.s. 00146. This latter qualification was a specific *preferred* qualification for the administrative opening at Orion Oaks. Exh. 23. Table 3 compares

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<sup>7</sup> On the other hand, Plaintiff was told by one assistant superintendent to be more *informal* in interviews, and by another to be more *formal*. *Id.*

the qualifications of Olds and Mick in 1997 relative to the Orion Oaks Administrative Assistant job:

**TABLE 3.**

Job requirement	Melanie Olds	David Mick
Valid teaching certificate	Yes	Yes
Masters in Administration at beginning of assignment	No at time of interview Yes at time of assignment	Yes, Double Masters degrees
4 years successful teaching experience	[Yes] [4-5 years at most <sup>8</sup> ]	Yes, 23 years successful teaching experience
Knowledge and experience of multi-aged instruction preferred	No indication	Yes, years of research and presentation in multi-age instruction
Knowledge and experience with School Improvement and school accreditation process	No indication	Yes, 7+ years as Chairman of School Improvement and school accreditation committees

Cf., Olds credentials, Exh. 18, and Mick credentials, Exhs. 3,4, 27 at pp. 16-18.

Plaintiff also applied for the assistant principal opening at Waldon Middle School in 1997.<sup>9</sup> Susan Weaver, a parent on the committee, signed an affidavit and will testify

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<sup>8</sup> Ms. Olds was not available for deposition due to a pregnancy. This information was compiled from records of her educational and work history. Exh. 18. She graduated from undergraduate school in 1992; she therefore could not have more than 4-5 years teaching experience as of 1997.

<sup>9</sup> This job was given to a male. Plaintiff's claim, however, is that Lake Orion discriminated by preferring females in *elementary* principal positions; the Waldon Middle School application process is mentioned because it demonstrates suspicious treatment of Plaintiff's candidacy; the fact that a male wound up with the job does not negate the evidence of the treatment of Plaintiff during the application process.

that the committee was not given Mick's credentials and did not therefore, after interviewing him, consider him a true candidate for the job. Exh. 52. After Weaver discussed this point with Plaintiff afterwards, she later received a phone call from Defendant Kast in which Kast "screamed at and berated" Mrs. Weaver for having divulged "confidential" information. Id.

In 1998, Plaintiff applied for the Orion Oaks principalship. Again Bass gave the job to Melanie Olds *without an open and competitive process*. Exh. 2, pp. 49-50. As to why Bass did not open up the job for competition, he testified:

"There was no point. I felt this woman had proved herself, she was tried and tested and at that point I viewed it not equal to but similar to a transfer." Exh. 2, p. 51.

Thus, Olds had gotten the administrative assistant job by "appointment" by Bass after "limited competition," and then *because she had the experience in that job*, was given the next promotion to principal on the reasoning that she was "tried and tested." It should be noted that while Ms. Olds received preferential consideration for having been "tried and tested" at Orion Oaks for the previous *one year*, Plaintiff did not receive the same consideration in 1996 for the Webber principal opening, although he had been "tried and tested" with outstanding results for *eight years* at Webber at the time.<sup>10</sup>

Upon learning of the Olds appointment without competition to the Orion Oaks

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<sup>10</sup> Although Defendant will argue that Plaintiff "did not have the support" of the staff at Webber for the principal job, that assertion is belied by the contemporaneous petition of support signed by every person on the staff with the possible exception of one. See Exh. 27, dep. of Plaintiff, internal exhibit 9 attached to deposition. This at least raises a question of fact as to the credibility of Defendant's explanation of its motives.

principal position, Plaintiff immediately filed a claim of gender discrimination with the EEOC in July, 1998. Exh. 41. It is undisputed that Plaintiff filed the claim, and all individual Defendants have admitted to gaining knowledge of the filing within a range of a few months to approximately a year. Dep. of Bass, Exh. 2, p. 73 ; dep. of Kast, Exh. 14, pp. 29-30; dep. of Lehman, Exh. 13, pp. 19-20; dep. of Younkman, Exh. 11, pp. 108-109; dep. of Beiter, Exh. 29, pp. 53-54.

Bass left the district in June, 1999. Defendant Craig Younkman replaced Bass as superintendent.<sup>11</sup> It is undisputed that Plaintiff brought his concerns to Younkman in August, 1999 by giving him a packet of information describing comprehensively Plaintiff's complaints of discrimination and his EEOC claim. Exh. 11, pp. 108-109; Exh. 54. Younkman responded to Mick with a letter containing Younkman's explanation and justification of the district's acts over the previous 10 years. Exh. 55.<sup>12</sup>

Plaintiff applied for the principalship of Pine Tree Elementary in December, 1999. Plaintiff submitted his packet of materials timely and was scheduled for an interview on December 2<sup>nd</sup>. Plaintiff was called in for a meeting with Defendant Beiter, on matters concerning Plaintiff's position on the social studies curriculum committee, in the hour before Plaintiff was to interview. At the meeting, Beiter was combative with Plaintiff and

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<sup>11</sup> Younkman also followed Bass as superintendent when Bass left the Western School District in 1991. Bass testified that the pattern was purely a coincidence. Exh. 2, pp. 33-34.

<sup>12</sup> On cross-examination, Younkman conceded that many of the points he made in the letter were factually untrue or based on speculation. Exh. 11, pp. 112-127. He was asserting the District's "party line" and was willing to tell falsehoods and half-truths to do it. This too raises a question of the credibility of Defendant in its explanation of its conduct towards Plaintiff.

caused Plaintiff to be upset. Exh. 27, pp. 163-166. At the end of the meeting, Beiter remarked to Plaintiff, "and now it's time for your interview." Also, Defendant Lehman, in charge of hiring and personally involved in the Pine Tree interview process, made notes on the materials submitted by the candidates for that job. Although Lehman testified that she recalled that she and the interview committee did have Mick's information on a timely basis, Exh. 13, p. 93, Lehman's contemporaneous notes indicate the expression "**no info**" for the candidacy of Mick, who had been in the school district for 25 years and who had submitted a full packet of information. Exh. 53. At the interview of Plaintiff, Lehman announced that Plaintiff needed to submit more current letters of recommendation by the following morning. Exh. 27, pp. 172-173. Plaintiff called approximately 35 people that night and made a list and turned it in to Lehman the next morning. Lehman then did not call anyone on the list, explaining in deposition that she had not called anyone because Mick "was not a final candidate". Exh. 13, pp. 96-97, 99-100.

**H. The discriminatory background of Defendant District, and discriminatory predisposition of Defendants Bass, Lehman, and Rossi against males in principal jobs at the elementary level and against males in general**

**i. Gender-conscious hiring**

Defendant District has admitted that it is ***gender-conscious in its hiring practices, without pursuing any affirmative action plan.*** Defendant Lehman, current Assistant Superintendent of Human Resources, has been in charge of all hiring in the district since Summer, 1999. Exh. 13, pp. 26-27. She testified:

Q During the hiring process when you have received applications and you're done receiving applications, before the next stage do you ever look at how many males have applied and how many females have

applied?  
A Sure.  
Q Okay. What is the purpose of doing that?  
A Purpose of doing that is to try and be fair about male-female hiring.  
Q **So to some degree you're conscious of gender in the hiring process?**  
A Yes.  
\*\*\*\*  
Q **Is there an affirmative action plan in place at Lake Orion Schools?**  
A No. Sorry.

Exh. 13, pp. 75-76. Lehman further explained that being gender-conscious is also for the purpose of ensuring that there are the right "role models" in the elementary schools:

Q **So you are gender conscious in the hiring process to make sure you don't discriminate against males or females, is that right?**  
A I don't know if discrimination is the right word. But at a young level you want role models in both genders.  
Q What do you mean by at a young level?  
A Elementary schools.  
\*\*\*  
Q You want role models?  
A Uh-huh.  
Q Yes?  
A Yeah.  
Q **And does the issue of gender play a part in the idea of role models in your mind?**  
A Well, of course.

Id., pp. 76-77.

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Lehman also testified that, as an interviewer, she would not give consideration to an interviewing candidate for the candidate being particularly nervous that day during the interview. Exh. 13, p. 67. However, Lehman's notes on Gloria Rossi's interview papers

contain the following in Lehman's hand: "Gloria must have been nervous," and "Gloria is much more positive than she appeared." Exh. 20.

Lehman testified that she worked "closely" under Defendant Bass in the year before she became assistant superintendent. Exh. 13, p. 21.

**ii. Bass: eight females, zero males**

Defendant Bass was a superintendent in the Western School District before he came to Lake Orion. Exh. 2, p. 14. At the time of Bass' hire as its superintendent, the Western district had **never had a female administrator** at any of its schools according to records going back to 1970. The list of administrators in the Western District from 1970 forward at Exh. 26 has been provided by the current Western superintendent, John Diardzinski, pursuant to subpoena.

However, in his reign as superintendent at Western, **Bass appointed females as principals in two out of three of the elementary schools**, and male administrators remained in the middle and high schools. Exh. 26. Bass testified that he was involved in the appointments of these women. Exh. 2, pp. 20-21, 25-26. When Bass came to Lake Orion in 1990, he brought with him the reputation of "liking women in the [elementary] buildings and men in the front office." Plaintiff's dep. Exh. 27, pp. 81-82. This reputation was heard about by Jan Glebe also; Exh. 25, p. 18.

Bass' conduct as Lake Orion superintendent from 1990 to 1999 confirmed this reputation. During his reign, **eight females** were appointed by him to elementary

principalships, and with the exception of one two-week stint by David Beiter, **zero males**.<sup>13</sup>

Exh. 28. Bass admits the trend:

Q Would you agree with me that apart from the two-week appointment of Mr. Beiter only females worked for you as principals or only females were appointed by you as principals while you were superintendent for Lake Orion?

A It appears, yes. (Exh. 2, p. 92, commenting on Exh. 28)

Table 4 depicts the history of elementary principals according to gender during the reign of Bass. The data is taken from Defendants' own list at Exh. A attached to their motion for summary disposition.<sup>14</sup>

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<sup>13</sup> Although Defendants asserted that Beiter's appointment to principal of Blanche Sims was the result of a "lengthy selection process," Defendants did not attach or cite to any proof whatsoever in the trial court. Beiter testified that he "interviewed" for the job, but that is the extent of the record as to his appointment there. Exh. 29, pp. 7-8. In any case, it was Bass' first September on the job, and Beiter did not stay at Blanche Sims past two weeks. Bass gave the job to a female, Janet Burns, without open competition. Beiter's brief appearance as an elementary principal should be given little weight relative to Plaintiff's assertion that the district prefers females in the elementary schools. The district preferred to move Beiter to a middle school rather than leave him at the elementary level.

<sup>14</sup> Defendants argued below that Plaintiff's pool of analysis should be broadened and re-defined to include other than elementary schools, arguing that there has not been discrimination in *middle schools and high schools* in Lake Orion. But a plaintiff is entitled to frame his proofs in the manner he wishes, provided there is a logical basis. Here, Bass came with a reputation for preferring females in elementary schools and confirmed that reputation throughout his tenure. Females dominated as principals in elementary schools under Bass; that is the basis for Plaintiff's claim focusing on the elementary level. Another logical basis to separate the analysis of elementary versus higher-level schools is the undisputed fact that for the different-aged children at the different levels the State used to require different certifications for administrators— the jobs are different. Lehman's testimony that specific "role models" are desirable for the elementary level further supports the distinction.



TABLE 4.

<b>GENDER OF ELEMENTARY PRINCIPALS DURING REIGN OF ROBERT BASS</b>								
School	91-92	92-93	93-94	94-95	95-96	96-97	97-98	98-99
Blanche Sims	F***	F	F	F	F	F***	F	F
Carpenter	F	F	F	F	F	F***	F	F
Pine Tree	F	F	F	F	F***	F	F	F
Stadium	M	M	M	M	M	M	M	M
Webber	F	F	F	F	F	F***	F	F
Orion Oaks	-	-	-	-	-	F***	F	F***

\*\*\* Asterisks indicate the person is new to the position that year

Table 4 indicates that when Bass came, a male already occupied the job at Stadium Drive. In *all the other schools*, Bass' administration saw to it that a *female* was newly appointed as principal in one way or another, singly or on multiple occasions, during his reign.

In the trial court, Defendants argued that between 1991 and 2001, 9 males had been hired as administrators in Lake Orion compared to 11 females, implying that Lake Orion has been fair as to gender in its hiring. This argument apparently carried the day with Judge Schnelz. Trscrpt., pp. 13-14. However, first, the time period Defendants offered does not correlate with Plaintiff's claims. Plaintiff claims he was discriminatorily

rejected from elementary principal positions *during the tenure of Robert Bass*, from September, 1991 to June, 1999.

Second, the males Defendants list were, with the exception of Jesse Baker in June, 1999, all either middle school hires or non-principal hires, and 6 of 9 were hired *after Plaintiff's EEOC claim*. Table 5, again using data from Defendants' summary disposition motion Exhibit A, indicates these facts:

**TABLE 5.**

Name and Year of Male Hired		Position Received	Before or After Plaintiff's 1998 EEOC claim
Beiter	1991	-mid. school principal	before
Fries	1995	-mid. school ass't prin.	before
Hammond	1996	-mid. school ass't prin.	before
Quinn	1999	- elem. ass't prin.	after
Baker	1999	- elem. prin.	after
Gutman	1999	-mid. school prin.	after
Whitney	2000	-elem. ass't prin.	after
Kaplan	2001	-elem. ass't prin.	after
Haas	2001	-mid. school ass't prin.	after

As Table 5 indicates, Defendants did not appoint a male to an elementary administrative position during Bass' tenure and before Plaintiff's EEOC claim in 1998. Defendants' post-EEOC claim activity of hiring males may be viewed as attempts to thwart Plaintiff's claims.

It should also be noted that after Beiter's appointment to Waldon Middle School

principal in 1991, the males that got jobs in Lake Orion at any level all had to go through a competitive interview process to attain the position. In contrast, **four of six** females who got administrative jobs in Lake Orion during the same period were appointed to the jobs without a true competitive process. See Exhibit 2, pp.45-53, and Exhibit 24, pp 15-18, which show that Burns (1991), Rossi (1996), Olds (admin. asst., 1997), and Olds (principal, 1998) were appointed by Bass without regard to open and competitive procedures or preference rules. These facts are undisputed and are telling as to the desire of the district to maintain its complement of female elementary administrators.

Defendants also offered the trial court an affidavit by Joanne Welihan. Ms. Welihan had nothing to do with Plaintiff's employment, was not an employee or agent of any kind of Defendant District, and did not purport in her affidavit to be an expert or offer expert opinions. Apart from being the "Executive Director" of the association she represents, an association which neither she nor Defendants explained or described in any manner, Ms. Welihan presented the trial court with no credentials with which to opine on the reasons Plaintiff has not gotten a principal's position. She did offer lay opinion, but did not provide the court with any foundational documents or sources to support her lay opinion. Her opinions were conclusionary and vague. She offered phrases such as "a large percentage of all elementary and middle school principals... join our organization each year" and "the continuing statewide trend ... is due primarily to the fact that...". These statements, which comprised Ms. Welihan's premise and conclusion for her opinion in her affidavit, were insufficient to help the trial court, or now this Court, understand the issues involved in the suit. See, MRE 701.

However, even assuming Ms. Welihan's data to be accurate and helpful, *the inferences were in favor of Plaintiff and his claims*. In paragraph 3 of her affidavit, she alleges that 807 of the current membership of 1,414 elementary principals in her association are female; this works out to **57%** female elementary principals across the state. In statistical parlance, this would be the *expected population* when analyzing any given group of elementary principals.

In contrast, in Lake Orion, between 1991 and 1999, during Defendant Bass' reign as superintendent, the ratio of female to male elementary principals was always, depending on the number of schools existing at the time, either **4:1 or 5:1, or 80% or 83%**. This data comes from Defendants' Exhibit A. And even since 1999, in the face of Plaintiff's EEOC and circuit court claims, Defendants have only altered the gender ratio of elementary principals by one, adding a 28 year-old male principal at Blanche Sims, to bring the female-domination figure to **5:2, or 71%**. This is still higher than Ms. Welihan's figure of 57% female elementary principals across the state.

Moreover, Plaintiff offered the trial court numerical evidence from the website of the Michigan Department of Education, from a government statistic entitled "Gender distribution of public school teachers and administrators 1999-2000." The following numbers were posted:

	<b>Males</b>	<b>Females</b>
<b>Teachers</b>	<b>29.6%</b>	<b>70.4%</b>
<b>Administrators</b>	<b>61.2%</b>	<b>38.8%</b>

Please see Exhibit 59. Again, using these figures (which are admissible under MRE 803 (8)), the *statewide expected population* of female administrators in any given district is exceeded in Lake Orion; there, whether one considers the pool of elementary alone (4 out 5, 5 out of 6, or 5 out of 7; 80%, 83% or 71%) or the pool of elementary and secondary administrators together, including assistant principals (from 1991 to the present, 5:2, 5:2, 5:2, 5:2, 5:4, 6:4, 7:4, 6:5, 7:4, 8:4, 7:6) *females outnumber males at all times*. This is a *reversal of the expected population* as determined by the State of Michigan. This numerical evidence supports Plaintiff's claim that Lake Orion is predisposed to favor females in its administration, and particularly in its elementary schools.

Another window on the predisposition of Bass is Bass' declaration to an assembly of district employees that after he would retire from the administration he planned to seek employment with the Playboy organization. Bass admits this remark; Exh. 2, p.76. It is simply too much of a coincidence to not be evidence to be heard by a jury, that Bass focused on females as "his" principals in the District, and declared that when he would leave the District, he desired to go to work for an organization that does nothing but focus on females. Also, Bass' name appears as a reference in support of the resumes and candidacies of 2 women, Gloria Rossi and Diane Dunaskiss, Exh. 40. In contrast, Bass railed bitterly against being used as a reference by Plaintiff, despite his having written and signed a supporting reference letter for Plaintiff. Exh. 2, p. 91. In support of Dunaskiss' application for one job, Bass wrote, though ignorant of the qualifications that other applicants might have, that Dunaskiss was "the most qualified" person for the job. Exh. 40.

Plaintiff experienced other indications of gender-consciousness and gender

prejudice against males in his own school, Webber, under the principalship of Gloria Rossi. Rossi expressed herself in gender-conscious stereotypical expressions. In one note, Rossi wrote, "I am exercising my right to be a woman and change my mind." Exh. 39. In another note, Rossi wrote, "I feel like the woman who's been left for a younger model." Exh. 39a.

Under Rossi, the number of male staff at Webber decreased from at least 5 to three over the 5 years she was there. Exh. 31 is a Lake Orion Community Schools web page dated 5/23/01 showing only 2 male employees on the entire Webber staff apart from Plaintiff. In the previous year, two other males, Howard James Sanford and Mike Kulik, had been pressured to leave; see Exh. 32 and discussion immediately below regarding Sanford. Under Rossi at Webber, there was literally a "sorority" organization for the females, Exh. 22, pp. 17-18, but no "fraternity" for the males.

In the instance of Sanford being separated from Webber, Rossi testified that Sanford, with 23 years seniority, "voluntarily resigned" and that Rossi "did not know" "why he made that choice." Exh. 12, p. 26. Lehman testified similarly, adding that neither she nor anybody had put any pressure on Mr. Sanford, nor had Lehman given Mr. Sanford any "ultimatum," before he "voluntarily resigned." Exh. 13, pp. 109-110.

However, a transcript of the meeting at which Sanford was charged with an alleged offense clearly shows a great deal of pressure being put on Sanford by both Rossi and Lehman, including a strict ultimatum by Lehman:

[Lehman]	As your supervisor, I'm directing you to tell me who told you this information.
[Rossi]	Remember you are <b><i>insubordinate</i></b> by not

sharing the information.  
[Sanford] \*\*\*  
[Lehman] I understand wording wasn't perhaps the best,  
but I've asked three times ...***if you don't answer  
the question, it will be immediate  
termination.***  
AFSCME left for caucus for 18 minutes.  
[union rep] We have an offer we would like to make. Jim  
[Sanford] would rather turn in a resignation than  
tell you who the person involved is.

Exh. 32. (Emphasis added) According to the transcript, Sanford was being accused of relaying to another person something he heard from someone else. Id. Because he would not identify the person from whom he had heard things, he was being threatened with discharge. Id.

Defendant Rossi permitted crude anti-male jokes to be distributed to the staff; Exh. 33. Although she claims to not allow such conduct, the jokes were sent around to the entire staff --except for the men ("sorry, guys"; Id.)-- and Rossi did not respond with any censure.

Another circumstance was when Rossi allowed female teachers to serve as "acting principal" while she was out of the building, Exh. 25, pp. 12-13, 15-16, but after being expressly requested for the privilege by Mick, would not allow him.<sup>15</sup> Exh. 34. Rossi denied ever hearing the phrase "acting principal," Exh. 12, pp. 12-13, but the fact that this concept existed and was in practice under Rossi is established not only by Plaintiff's testimony, Exh. 27, pp.158-159, but by the testimony of Glebe, Exh. 25 at pp.12-16.

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<sup>15</sup> When Beverly Tepper was successful in her application for the Blanche Sims job in 1995, she touted her credentials as including being "Teacher-in-Charge" and "Acting Principal." Exh. 16. This was the reason Plaintiff continuously sought the privilege of serving as acting principal in the absence of Rossi.

Defendant Kast also claimed ignorance of the concept of "acting principal," Exh. 14, p. 82, but Tepper's letter to him in 1995, Exh. 16, talking about the concept, raises an issue of Kast's credibility.

Defendant Lehman also flatly denied ever hearing the phrase or the concept of "acting principal;" Exh. 13, pp. 119-120. However, an email from Lehman to Rossi arising out of Plaintiff's request to be "acting principal" indicates a) that Lehman did know about the phrase "acting principal," and b) that much more is going on behind the scenes than is being conveyed to Mr. Mick. After being forwarded Mick's email request for the opportunity to be "acting principal," Lehman wrote to Rossi:

Gloria, this is interesting. This came up at CMC. We need to talk. Please do not use anybody for this until we can. Thanks.

Exh. 35. Lehman did *not* say in this email, "what is Mick talking about? What does he mean by 'acting principal'?" An issue of Lehman's credibility is also raised here.

In another example of different treatment of males and females in the district, in December, 1999 and January, 2000, Plaintiff was told by Defendant Rossi to resign from the position of chairman of the building School Improvement Committee. Exh. 36. One reason cited by Rossi was that after all the years Plaintiff served as chairman it was time to give others a chance at the "leadership" position. *Id.* Yet, Ann Galovich, also chairperson of a School Improvement Committee in Lake Orion for 10 years, was not asked to step down from her position by the district. Exh. 37 (Galovich dep, p. 7 and email). When Plaintiff did step down as he was told, he was replaced by two females. Rossi dep., Exh. 12, p.80. Rossi then permitted these females the ability to distribute



agendas for committee meetings on the same day of the meetings, whereas she had been strictly requiring Mick to have the agendas to the meeting participants *three days prior to the meetings*. Cf. Exh. 12, pp. 104-105 with Exh. 38.

**I     Retaliation against Plaintiff after he filed with the EEOC.**

Plaintiff Mick had **no disciplines** and literally **no criticisms** of his performance, conduct or character in his entire career with the District, for 24 years from 1974 to 1998. There was nothing in the record below indicating that before July, 1998, Mick had any marks of any kind against him in his decades of employment in Lake Orion. This is a very long time without a single offense, a single incident of any kind in one's employment. Mick was simply a highly respected, highly competent educator beloved year after year by generations of students, parents and the community at large.

At the time of his filing with the EEOC, Mick occupied the paid positions of chairman of the building School Improvement Committee and chairman of the district-level Social Studies Curriculum committee. Exh. 5. He had excelled in the two posts since 1990. See Exhs. 6-9.

After his filing with the EEOC, Mick's employment suddenly became precarious. Mick was involuntarily removed from both chair positions. Rossi removed Plaintiff from the School Improvement chairmanship and replaced him with two females; see Exh. 36 and Exh. 12, p. 80. Defendant Beiter removed Mick from the social studies position, and replaced him with three females; Exh. 42 and Exh. 29, pp. 55-56. In both cases, the alleged reasons were bogus.

Rossi told Mick it was time to give others a chance, but an equally-tenured female

chairperson was not told the same thing. Exh. 37. Margo Pittman described the removal of Mick from the School Improvement Committee as "unprofessional." Exh. 24, p.37. Rossi tried to assert that she was not asking Mick to step down, but her omission to indicate such in a contemporaneous response to Plaintiff's email proves her insincerity. Exh. 43.

As to the chairmanship of the district Social Studies Committee, Defendant Beiter removed Plaintiff from the job in September, 2000. Exh. 42. It is undisputed that this was an involuntary discharge. In Beiter's memorandum to Plaintiff outlining his alleged reasons for discharging Plaintiff from the position, Beiter cites essentially four reasons. All are spurious reasons and imply retaliation against Plaintiff.

The first reason chronologically related to an event almost one year earlier, in December, 1999. Beiter admitted in deposition that he did not tell Plaintiff that the event had made Beiter unhappy until the meeting in September, 2000 when he was informing Plaintiff he was removing Plaintiff from the chairman position. Exh. 29, pp. 88-89.

The documentation surrounding the 12/99 event belies Beiter's version anyway, and Beiter has no documents to support his version. According to Beiter, Plaintiff was supposed to give a presentation to district social studies committees focusing on substantive state "standards," but instead focused on the instructional methodology of "authentic assessment." Exh. 29, p. 68. Beiter testified that Plaintiff was "close" to being "insubordinate" when he did so. Id., p. 69. Beiter, however, did not write it down or discipline or even mention it to Plaintiff at the time. Id., p. 88. Moreover, Plaintiff testified that Beiter expressly directed Plaintiff to talk on the subject of authentic assessment, Exh.

27, pp. 162-167, and Plaintiff produced for the trial court a written authorization from Beiter to attend a seminar on authentic assessment a few weeks before the presentation. Exh. 44. Plaintiff also sent Beiter an outline of his agenda on November 14 which included the topic of authentic assessment, Exh. 45, which was not responded to by Beiter until Beiter called for a meeting with Plaintiff days before Plaintiff's presentation.<sup>16</sup>

The second reason Beiter gave related to Beiter allegedly being unhappy in Spring, 2000 with Plaintiff's work in realigning social studies standards. Exh. 42. However, again, there is *no evidence in the record* that Beiter told Mick anything about any deficiency in Mick's performance along those lines until he was discharging Plaintiff in September, 2000. Also, documents contemporaneous with the Spring time period show nothing allegedly on the mind of Beiter regarding any deficient performance by Mick, but rather show Beiter *thanking Plaintiff for his work at the time*; Exh. 46.

The third reason cited by Beiter was Plaintiff's alleged failure to arrange materials and meetings with other committee members in preparation for an August, 2000 district in-service at which Plaintiff was to give a presentation. Exh. 42. Beiter testified that he had given Plaintiff an explicit "directive" to coordinate with the others and that Plaintiff failed to do so. Exh. 29, pp. 98-99. However, the documents clearly contradict Beiter, showing

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<sup>16</sup> It is relevant to Plaintiff's claims of unfair application processes and retaliation that Beiter deliberately called this meeting for one hour before Plaintiff was to interview for the 1999 Pine Tree Elementary School principal opening. He told Plaintiff it was a good time to meet about Plaintiff's presentation because Plaintiff would be in the central office for the interview anyway. Exh. 27, p.162. Beiter was abrupt and confrontative with Plaintiff, ordered Plaintiff to undo much of Plaintiff's preparation for the presentation, and upset Plaintiff the entire meeting. At the end of the meeting, Beiter said to Plaintiff, "and now it's time for your interview."

that he casually asked questions and made observations certainly not rising to any level of "directive" and certainly not implying any great concern for the preparation for the meeting. See Exh. 47. Plaintiff's correspondence with others after being accused by Beiter further indicates that Beiter's use of this matter to criticize Plaintiff was contrived. Exh. 48.

Finally, the fourth reason Beiter gave for removing Plaintiff from the social studies chair position was Plaintiff's alleged failure to make a proper presentation at the district meeting in August, 2000. Exh. 42. Beiter cited an alleged groundswell of complaints of "no confidence" in Mick's social studies leadership, but would not tell Plaintiff who or exactly what was the problem. Id. In deposition Beiter could not name names of alleged complainants, and Defendant did not produce any names at summary disposition; Exh. 29, pp. 102-104. Even if Beiter did name names, this would be hearsay and would constitute no proof in this case. Defendant's motion contained nothing to support the fact that there existed any complaints about Plaintiff's performance at that meeting. Plaintiff's performance in those events had been stellar for years. Plaintiff's excellent track record, see Exhs. 6-9, would have entitled Plaintiff to the benefit of the doubt at that meeting-- that is, if there were no agenda of retaliation against Plaintiff amongst the administration.

Plaintiff suffered numerous other forms of retaliation after his 1998 EEOC filing. As noted, Plaintiff never had disciplines or reprimands before his EEOC charge. In addition to being removed from two paid chairmanships, Plaintiff became the target of **two attempted write-ups, the first in his 24 years in Lake Orion**. In December, 1998 and January, 1999, in connection with being asked to step down from one chairmanship,

Plaintiff corrected the minutes of a meeting to reflect Plaintiff's memory of the meeting. This was Plaintiff's usual practice and prerogative as chairman. Defendant Rossi attempted to write-up Plaintiff for allegedly "tampering" with the minutes, and held a meeting to which Rossi brought Melanie Olds, the person whose appointment to principal had been the impetus of Plaintiff's EEOC filing. The write-up was ultimately rescinded. Exh. 49 *generally*.

In another incident in 2001 Plaintiff was criticized and called in for a formal meeting for allegedly not following proper procedures in reporting potential "child abuse." This matter too was resolved short of formal discipline, Exh. 50, but constituted another disturbing, "first-time" experience for the Plaintiff.

In December, 1999 and July, 2000, Plaintiff was shorted pay and had to write emails and to follow up in order to be paid properly. Exh. 51. This was the first time Plaintiff had ever had a problem with being paid by the district.

But in the clearest indication that Plaintiff's EEOC and Elliott-Larsen claims were a factor in the treatment of Plaintiff in his efforts to become a principal in the district, a concerned citizen and constituent of the district came forward with direct evidence that the district was retaliating against Plaintiff. Exh. 57 is an affidavit of Michael Lorts, a parent of three students in Lake Orion schools, who was on the interview committee for the principal opening at Webber Elementary School in September, 2001. Mr. Lorts was the only adult male (a fifth grade boy also participated on the committee), alongside 9 females on the committee. *Id.*, ¶¶ 2-4.

Mr. Lorts stated in his affidavit that the committee had Plaintiff's application and

credentials in its possession, but was not considering interviewing him for the job. It was considering, on the other hand, a female library assistant from another school district. ¶¶ 6-7. After Lorts pressed the issue aloud, the committee began to consider whether to interview Plaintiff. Id., ¶ 8.

Lorts further stated that one committee member, Pamela Kile, wondered aloud what the ramifications were to the fact that a candidate (referring to Mr. Mick) was currently suing the district. ¶ 8.

In answer to Ms. Kyle's question, another committee member, **Lori Penman**, who was at the time **a member of Defendant Lake Orion Board of Education**, stated words to the effect of, "it doesn't matter. It's a moot point. It [Plaintiff's application] won't go far." ¶ 9. Lorts stated that he was "sitting right there and heard this clearly" even though Ms. Penman "spoke in a low voice to Ms. Kyle." Id. Lorts understood Ms. Penman to be saying that whether or not the committee interviewed Mr. Mick, because he was suing the district he would not be a real candidate for the job in any case, that his candidacy "would not go far." Id.

Lorts further stated that Ms. Penman "saw that I had heard her comment, and immediately turned to me and said, 'I'm sorry. I shouldn't have said that.' Others there clearly heard Ms. Penman's comment too and her apology to me." ¶ 10.

Lorts finally notes that he believed Plaintiff to be the best choice for the job, and voted for him, but that his observation was that the majority-female committee appeared to desire that a female candidate ultimately be given the position, and that Plaintiff's gender was a factor in his being rejected. Id., ¶¶ 11-14. Ultimately a female, Suzanne

Price, did get the job.

J. **The Court of Appeals Decision**

The Court of Appeals reversed the trial court's summary dismissal of Plaintiff's claim of gender discrimination as to Defendant District, arising from the rejection of Plaintiff in favor of Melanie Olds for the Orion Oaks administrator position in July, 1998. The Court of Appeals affirmed the dismissal of all other claims of gender discrimination arising out of denials of other positions. The dismissal of all individual Defendants for all claims of gender discrimination was also affirmed.

The Court of Appeals reversed the trial court's dismissal of Plaintiff's retaliation claim, holding that genuine issues of material fact precluded dismissal as it pertained to Defendant Rossi's conduct in threatening Plaintiff with disciplinary measures, and ruling that Rossi, LOCS, Bass and Kast were improperly dismissed on that issue. All other claims of retaliation by Plaintiff were affirmed and dismissed.

## **II ARGUMENT**

I. **DEFENDANT CANNOT ESTABLISH A PROPER GROUND FOR REVIEW BY THIS COURT AS TO PLAINTIFF'S GENDER CLAIM AS TO THE ORION OAKS POSITION. THE COURT OF APPEALS' BRIEF TREATMENT AND VALIDATION OF THIS CLAIM WAS CORRECT, AND DEMONSTRATES WHY REVIEW OF THE ISSUE BY THIS COURT IS NOT APPROPRIATE**

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MCR 7.302(B) sets forth the grounds upon which this Court may grant leave to appeal. Defendant satisfies none of them with regard to Plaintiff's remaining gender discrimination claim. Defendant asserts that it is offering the Court an issue involving

"legal principles of major significance to the state's jurisprudence," *Id.* at (3), identifying "the proper utilization of the *McDonnell-Douglas* analysis in the confines of a reverse discrimination suit" and "the appropriate role of a court in weighing claims of discrimination which infringe upon employers' business decisions." Defendant also asserts that the Court of Appeals was "clearly erroneous," that "material injustice" will ensue, and that the Court of Appeals' decision "conflicts with decisions of this Court or of the Court of Appeals." *Id.* at (5). Defendant asserts, to satisfy these criteria, the argument that "a gender discrimination claim is not properly predicated upon a factual situation where another male was awarded the job," and that "a gender discrimination claim does not arise in those circumstances where the person ultimately filling the job position was more qualified than" Plaintiff.

Defendant cannot establish any proper grounds for appeal to this Court.

Starting with the latter two propositions, that "another male was awarded the job," and "the person ultimately filling the job position was more qualified than" Plaintiff, these alleged facts are simply not true or are great stretches of credulity. The remaining discrimination claim of Plaintiff's involves his rejection from the Orion Oaks position in favor of Melanie Olds, a *female*. See *supra*, at pp. 13-15. Plaintiff's other supporting proofs involve *females*, with rare exception. Furthermore, in light of the rather *imbalanced* comparative superiority of Plaintiff's credentials for the job to Olds' credentials, *Id.*, there is *at the very least* a question of fact as to who was more qualified for the job. This is not a question for this Court to address; this Court normally operates at a fair distance from this type of factual dispute. It is one for the jury, not the highest court in the State.



This is why the Court of Appeals was able to reverse the trial court and send this claim of Plaintiff's to the jury with a comparatively short analysis. The Court of Appeals held that Plaintiff had presented evidence that he had applied, was qualified, and was not chosen for the Orion Oaks position, and that a female less qualified than he was chosen. The court also held that Plaintiff had showed that the Orion Oaks principal position had not been opened to competitive process, "rather, the woman chosen was placed in the principal position from an administrative assistant position she had held for only one year, purportedly because she had 'proven herself.'" The court also found that Plaintiff's evidence could lead a reasonable factfinder to conclude that LOCS was "the unusual employer that discriminated against men in the selection of elementary school administrators." The court cited Plaintiff's evidence that between 1991 and 1999, "the overwhelming majority of elementary administrator positions went to women within the LOCS," and that the Orion Oaks principal position had not been opened to competitive process.

Any argument that a "reverse discrimination" plaintiff needs to offer a higher level of proof of discrimination has been clearly rejected by this Court in *Lind v. City of Battle Creek*, 470 Mich 230 (2004). The standard quantum of proof, long developed in this country and in this State, has been offered in and correctly approved by the Court of Appeals.

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Under the Elliott-Larsen Civil Rights Act, 37.2201 et seq., a plaintiff is required to present evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the job was given to

another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co* , 464 Mich 456, 463(2001).

Plaintiff satisfied these prima facie elements. It is well-proven and admitted that Plaintiff is **qualified** to be an elementary principal in Lake Orion; he has the degrees, the certification, the teaching and committee experience, and the spirited endorsement of the community of professionals and lay persons. Plaintiff **applied** for and was **rejected** from the Orion Oaks principal job, and the job was given to a female. Plaintiff also produced, among other evidence, evidence that the District has a strong pattern of preferring females in the elementary school principal position, and that Melanie Olds, the female who was given the job, was not required to go through the ordinary competitive process.

The burden of proof for a prima facie case of discrimination "is not onerous" and "poses a burden easily met." *Cicero v Borg-Warner Automotive, Inc.*, 280 F3d 579 (6<sup>th</sup> Cir. 2002), *citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-1094, 67 L.Ed.2d 207 (1981); *accord*, concurrence of Justice Riley in *Town v Michigan Bell Co*, 455 Mich 688, at fn 5 (1997). ("[T]he first stage of the approach was not intended to be overly burdensome for an employee to satisfy...").

Defendants' counter to Plaintiff's argument of the District's background of discrimination was simply to argue that Defendant did not discriminate when *all* its levels of schools, elementary, middle and high schools, were analyzed. Defendants attempted to show that males were hired into middle and high school jobs partly during the time of which Plaintiff complains and mostly *after* Plaintiff had filed with the EEOC.

However, this defense was merely the old and long-repudiated "bottom-line"

defense, which attempts to divert the attention of the factfinder away from the claimed discrimination to some other area of the organization where it can be argued discrimination did *not* occur. In other words, the bottom-line defense says, "as long as the overall result of our practices appears free from discrimination, we should not be found to practice discrimination in any single part of our operation." Another form of the defense says that it is a complete defense to one person's claim by showing no discrimination as to another person. "See?" this angle puts it, "we hired a minority vice president, so the failure to hire that minority to that other job cannot be discriminatory."

The bottom-line defense was repudiated many years ago. In *Connecticut v. Teal*, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982), the Supreme Court held simply:

It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employee's group. *Id.* at 2530-36.

The Sixth Circuit also long ago acknowledged this law; see *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 11/04/1983). Defendants' attempt to broaden the analysis to include its practices regarding middle school and high school principals is an attempt to argue the "bottom-line" defense; it was rejected by the majority in the Court of Appeals, and should be rejected by this Court.

Once Plaintiff has put on his prima facie proofs and Defendants have articulated and alleged legitimate, nondiscriminatory reason for the adverse employment acts, Plaintiff must develop proof of pretext.

Beginning with Bass' 1991 appointment of Janet Burns to the Blanche Sims

principalship, this was a departure from the prescribed procedure of posted, open and competitive, committee-based process. Plaintiff was deprived of a chance to become a principal in favor of the unilateral appointment of a female without the prescribed committee-based process. The same departure from procedure in favor of a female occurred in 1996 (Rossi at Webber), 1997 (Olds at Orion Oaks) and 1998 (Olds at Orion Oaks). As to the latter appointment, Defendant Bass' explanation for putting Olds into the position over Plaintiff without opening the job to competition was simply, "There was no point. I felt this woman had proved herself, she was tried and tested and at that point I viewed it not equal to but similar to a transfer." Exh. 2, p. 51. From Plaintiff's perspective, with the background evidence of Bass preferring to have females in the elementary principal positions, this was simply a matter of gender discrimination and choosing who Bass wanted without restriction of any kind. Defendant Bass even admitted that he did not have authority to appoint a principal without posting the job, except for the situation of a "transfer," which he admitted did not apply in the case of Ms. Olds:

Q In Lake Orion Schools when you were a superintendent, if there were a vacant principal's position that was a new position ***you did not have the right*** to appoint somebody unilaterally but rather there had to be a posting and a competitive interview situation, ***isn't that true?***

A If we were hiring a new person for the position, ***yes.***

Exh. 2, p. 22, and

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Q So [the appointment of Ms. Olds] was not a transfer?

A No.

Id. at 51. Departure from normal procedures constitutes evidence of pretext. *Watson v*

*National Linen Service*, 686 F2d 877 (11 Cir 1982); *Giacoletto v Amax Zinc Co.*, 954 F2d 424 (7 Cir 1992). Pretext may also be shown by evidence of disparate treatment in the reason given for the rejection of Plaintiff. *Lytle v. Malady*, 458 Mich. 153 (1998). Plaintiff did not receive the benefit of the “tried and tested” standard when he applied for the principalship of his own school, Webber, in 1996. Plaintiff had successfully “tried and tested” his qualifications for *eight years at Webber* before he applied for the principalship there; Ms. Olds had been at Orion Oaks *only one year* before she was declared to be “tried and tested.” Such *disparate treatment* is one form of proof of pretext.

Plaintiff also submitted proofs that there is an issue of fact as to whether Ms. Olds was even qualified for the job, and certainly an issue as to whether she was *less qualified than Plaintiff*. Table 3 above at p.12, comparing Plaintiff's and Ms. Olds' qualifications, highlights the deficiencies in Ms. Olds' training and experience both objectively and compared with Plaintiff's.

Pretext may also be shown by evidence that the nonplaintiff selectee in a hiring case is *less qualified* than the plaintiff. *Lilly v Harris-Teeter Supermarket*, 842 F2d 1496 (4 Cir 1988); *accord, Luna v City & County of Denver*, 948 F2d 1144 (10 Cir 1991).

Having established a prima facie case under the liberal standards of MCR 2.116 (c)(10), and having submitted evidence that the decision to give the Orion Oaks principal position to a less-qualified female was pretextual, Plaintiff's failure to hire claim based on gender discrimination should go to the jury. The Court of Appeals was correct in holding that the trial court erred in dismissing this aspect of Plaintiff's claim. The court was not “clearly erroneous,” and there are no unusual proof issues or legal issues this Court

should properly review.

**II THE COURT OF APPEALS WAS CORRECT IN FINDING A GENUINE ISSUE OF MATERIAL FACT DOES EXIST AS TO PLAINTIFF'S CLAIM OF RETALIATION FOR FILING AND SUCCEEDING IN AN EEOC CLAIM, WHERE PLAINTIFF'S LONG, UNBLEMISHED CAREER AND REPUTATION CAME UNDER SEVERE ATTACK WITHIN DAYS AFTER HE WAS SUCCESSFUL IN THE EEOC.**

Nor has Defendant satisfied MCR 7.302(B) with regard to the Court of Appeals' ruling on Plaintiff's retaliation claim.

The Elliott-Larsen Civil Rights Act, MCL 37.2201 et seq. is a remedial statute which has been described as a statute of "manifest breadth and comprehensive nature," *Eide v Kelsey-Hayes Co*, 431 Mich 26, 35-36 (1988); furthermore, "[r]emedial statutes are to be liberally construed to suppress the evil and advance the remedy;" *Corley v. Detroit Bd. of Educ*, 246 Mich.App. 15, headnotes 15-17 (2001).

Plaintiff brought a claim of retaliation under the Elliott-Larsen Civil Rights Act, MCL 37.2701, MSA 3.548(701) against all Defendants. Section 701 states:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

The components of a retaliation claim are protected activity, an adverse employment act, and a causal connection between the two. *Deflaviis v. Lord & Taylor, Inc.* 223 Mich.App. 432, 437 (1997). A plaintiff may use direct or circumstantial evidence. *Harrison v. Olde Financial Corp.*, 225 Mich.App. 601, 607-609 (1998). When using circumstantial evidence, the McDonnell-Douglas shifting-burden paradigm is appropriate. *Id.*

In the McDonnell Douglas circumstantial evidence model, to establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc.*, 223 Mich.App. 432, 436, 566 N.W.2d 661 (1997), citing *Polk v. Yellow Freight System, Inc.*, 876 F.2d 527, 531 (C.A.6, 1989); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (C.A.6, 1989); *Kroll v. Disney Store, Inc.*, 899 F.Supp. 344, 348 (E.D.Mich., 1995).

Elements one and two were not disputed. Plaintiff filed with the EEOC on July 1, 1998, Exh. 41, and all Defendants acknowledged knowing about it; see p. 14, *supra*.

Element three, adverse employment action, is well-established by Plaintiff, as was and recognized by the Court of Appeals. Plaintiff was disciplined for the first time ever in his 24-year career within days of receiving a favorable determination on his claim with the EEOC. Please see pp. 30-31, *supra*. This evidence, particularly on a (c)(10) motion, should be able to imply a causal relation between the events.

The conduct which Plaintiff was made the object of was sufficiently "adverse" to constitute retaliation under the Civil Rights Act. As the Court of Appeals stated, it was more than "mere inconvenience" or an "alteration of job responsibilities" "for Plaintiff's performance to be criticized (for the first time in his 23 years of employment with the school district), by the principal at the elementary school at which he taught, in writing, and copied to plaintiff's personnel file, referring to plaintiff as 'deceptive and insubordinate,' and

threatening 'more severe action[ ]". This treatment was humiliating to Plaintiff and ludicrous under the circumstances and should be submitted to a jury. However, Plaintiff recognizes that the Court of Appeals' ruling sends Plaintiff's retaliation claim, in its present remaining substance, to the outer bounds of the case law defining what is a sufficiently adverse consequence a plaintiff must suffer from the retaliatory acts of the defendant. The adverse consequence here was utter humiliation, frustration, and outrage in the context of Plaintiff's sterling career and his righteous and proper claim with the EEOC.

### **III CONCLUSION AND RELIEF REQUESTED**

Plaintiff provided ample evidence to support a prima facie claim of gender discrimination. It was undisputed that Plaintiff was qualified, rejected, and that a less qualified female received the job for which Plaintiff applied. Plaintiff also proved that Defendants had a pattern or practice of preferring females in principal positions in their elementary schools, and pretext in Defendants' explanations for their conduct. Defendant has offered no proper grounds for this case to be heard in the Supreme Court. Plaintiff requests that this Court deny Defendant's application as it pertains to Plaintiff's gender discrimination claim.

Plaintiff also respectfully requests that the Court deny Defendant's application for leave to appeal as it pertains to Plaintiff's remaining claim of retaliation.

Respectfully submitted,

LAW OFFICES JEFFREY S. BURG, ESQ.

